IN THE NINTH DISTRICT COURT OF APPEALS
BEAUMONT, TEXAS

STATE OF TEXAS,

Appellant,

VS.

CRAIG DOYAL, CHARLIE RILEY & MARC DAVENPORT

Appellees.

Appeal from the 221st Judicial District Court
Montgomery County, Texas
Trial Court Cause Nos. 16-06-07315-CR, 16-06-07316-CR, 16-06-07318-CR
Hon. Randy Clapp

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ORAL ARGUMENT REQUESTED

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"CRD [page]"	Refers to the Clerk's Record in State v. Doyal.
"CRR [page]"	Refers to the Clerk's Record in State v. Riley.
"CRMD [page]"	Refers to the Clerk's Record in State v. Davenport.
"RR(2) [page] [line]"	Refers to the Reporter's Record Volume Two of March 29, 2017.
"RR(3) [page] [line]"	Refers to the Reporter's Record Volume Three of March 30, 2017.
"RR(4) [page] [line]"	Refers to the Reporter's Record Volume Four of March 31, 2017.
"RR(5) [page] [line]"	Refers to the Reporter's Record Volume Five of April 3, 2017.
"RR(6) State [Ex. No.]"	Refers to the Reporter's Record Volume Six specified State Exhibit.
"RR(6) [Def.] [Ex. No.]"	Refers to the Reporter's Record Volume Six specified Defendant Exhibit.
APPX [Appendix No.]	Refers to a specified Appendix Tab.

I.
STATEMENT OF THE CASE

This case involves a constitutional challenge to § 551.143(a), Tex. Gov't Code which provides in relevant portion as follows:

> (a) A member or group of members of a governmental body commits an offense if the member or group of members knowingly conspires to circumvent this chapter by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter.

County Judge Craig Doyal and County Commissioner Charley Riley are members of the Montgomery County Commissioner's Court. Doyal and Riley each were indicted by a Montgomery County grand jury for violating the Texas Open Meetings Act (hereinafter, "TOMA" or the Act). In relevant portion, the indictments alleged

> "that they, as a members of the Montgomery County Commissioners Court, knowingly conspired to circumvent Title 5 Subtitle A Chapter 551 of the Texas Government Code (hereinafter referred to as the Texas Open Meetings Act or the Act), by meeting in a number less than a quorum for the purpose of secret deliberations in violation of the Texas Open Meetings Act, to-wit: by engaging in a verbal exchange concerning an issue within the jurisdiction of the Montgomery County Commissioners Court, namely, the contents of the potential structure of a November 2015 Montgomery County Road Bond." (CRD 6, CRR 5)

Marc Davenport is Conroe based political consultant. He is not a member of Commissioners Court. He too was indicted for violating TOMA; however, the Davenport indictment included language tracking the party liability provisions of

§7.02(a)(2), Tex. Code Crim. Proc. The Davenport indictment alleged, in relevant portion, that

> "with intent to promote or assist the commission of the offense described herein, solicit, encourage, direct, aid or attempt to aid Doyal, Riley and Commissioner Jim Clark to circumvent Title 5 Subtitle A Chapter 551 of the Texas Government Code (hereinafter referred to as the Texas Open Meetings Act or the Act), by meeting in a number less than a quorum for the purpose of secret deliberations in violation of the Texas Open Meetings Act, to-wit: by engaging in a verbal exchange concerning an issue within the jurisdiction of the Montgomery County Commissioners Court, namely, the contents of the potential structure of a November 2015 Montgomery County Road Bond." (CRMD 5)

Defendant-Appellee Doyal filed his Motion to Dismiss the Indictment on March 20, 2017 (CRD 45-67), and the State filed its Response to Doyal's Motion of Dismiss Indictment on March 21, 2017 (CRD 69-75). Defendants-Appellees Charlie Riley and Marc Davenport joined in Doyal's Motion to Dismiss Indictment on March 21 and March 22, respectively. (CRR 35-37, CRMD 50-53) In their motion, the appellees presented a facial challenge to the constitutionality of TOMA.

At the urging of Appellees, the trial court conducted a hearing to develop the appellate record solely on the question of the constitutionality of the statute. There was no testimony or other evidence presented concerning the facts that gave rise to the indictments. Rather, the Court heard testimony from lawyers versed in TOMA and individual members of various governmental bodies subject to TOMA.

On April 4, 2017 the Court entered its Orders dismissing the indictments, making no findings of fact or conclusions of law. (APPX 1, CRD 79, CRR 42, CRMD 61)

The State filed its notices of appeal in each case on April 19, 2017. (CRD 81, CRR 44, CRMD 63)

II.
STATEMENT REGARDING ORAL ARGUMENT

Appellant believes oral argument would be beneficial to full development of the important issues in this appeal. The trial court found a critical piece of the Texas Open Meetings Act to be facially unconstitutional thereby raising issues of vital importance to open government involving proper interpretation of the First Amendment and other jurisprudence interpreting the United States Constitution.

III.
ISSUES PRESENTED

I: The trial court erred by dismissing the indictment on grounds that the Texas Government Code § 551.143 is facially unconstitutionally vague and ambiguous.

- A. The Texas Open Meetings Act and Section 551.143.
- B. Prior Legal Challenges to TOMA.
- C. The Limited Value of the Trial Testimony
- D. Purposefully misreading a statute does not change its plain language.

II: The trial court erred by dismissing the indictment on grounds that Texas Government Code § 551.143 facially violates the First Amendment of the Constitution of the United States and is overbroad.

A. Section 551.143 is subject to intermediate scrutiny because it is a statute concerning private speech that is not aimed at suppressing specific content, but at eliminating the harm of government that is not transparent.

B. Section 551.143 is subject to intermediate scrutiny because it is a disclosure statute, and any protected speech it may reach is insubstantial in relation to its plainly legitimate sweep.

IV.
STATEMENT OF FACTS

None of the witnesses at the pre-trial hearing in this matter testified regarding the facts underlying the indictments. No evidence underlying the indictments was presented to the trial court herein as the trial court limited its consideration to a facial constitutional challenge to § 551.143. The State submitted a summary of the evidence in support of the indictments to the trial court under seal. (RR(6) State Ex. No. 10)

With regard to the testimony that was adduced, Appellees called six witnesses: Mr. Alan Bojorquez, a lawyer who represents governmental bodies, principally municipalities (RR(2) 23); Mr. Charles Jessup, mayor of Meadows Place, Texas (RR(2) 222); Mr. Eric Scott, mayor of Brookshire, Texas (RR(2) 257); Ms. Jennifer Riggs, an attorney with practice representing both sides of open government litigation (RR(3) 6), (RR(3) 251); James Kuykendall, mayor of Oak Ridge North, Texas (RR(3) 110); and Charlie Zech, a lawyer who represents governmental bodies. (RR(4) 6)

The State called two witnesses: James Rodriguez, a former Houston City Councilmember (RR(5) 6), and Joel White, an attorney with a practice representing media entities and a member of the Freedom of Information Foundation of Texas (RR(5) 61). In addition, the State submitted written testimony from Adrian Garcia, a former City Councilmember and former Harris County Sheriff. (RR(6) State's Ex. No.9)

Mr. Alan Bojorquez testified that he worked as in-house counsel for the Texas Municipal League for several years before forming his own law firm representing governmental bodies. (RR(2) 24) Mr. Bojorquez discussed the Fifth Circuit case of *Asgeirsson v. Abbott*, 696 F.3d 454 (5th Cir. 2012) which found section 551.144 to be constitutional. Bojorquez testified that despite the Fifth Circuit's ruling, "those of us in the industry are looking back going, well we still think it's unconstitutional; but some pretty big lawyers disagree with us, so we need to try to help municipal officials, counties, school district officials comply with it the best we can." (RR(2) 38) After identifying the purpose of the statute was to prevent members of governmental bodies from conspiring to avoid the statute by cooking the deal outside of the view of the public, he gave the opinion that he thought the statute was "gibberish." (RR(2) 40) Part of his opinion is based on his understanding that definition of "verbal", as far as he can tell, "is oral, not written." (RR(2) 126-127) He testified that typically, if he has

> "a client who, if they want to avoid the Open Meetings Act, it's not because they want to -- to violate it. It's because they don't want to have to deal with its requirements for various reasons. . . . [T]hey might talk two on two, or, you know, a mayor may speak to one council member and then another council member and then to a department head or a city manager to discuss an item, not because they want to violate the rule or shield the public. They want to avoid having to comply with one of the Open Meetings Act's requirements that they find burdensome at the moment." (RR(2) 45-46)

He advises his clients, "that if you're gathering in groups of less than a quorum for the purposes of avoiding the Open Meetings Act so you can hash something out, beware you might be prosecuted for 143." (RR(2) 53, 9-12) He could testify to no specific scenario where a governmental official subject to TOMA didn't know what was expected of them under the statute because it was vague and, in fact, it led to arbitrary or discriminatory enforcement. (RR(2) 155-156) Although he testified that section 551.143 is ambiguous, Mr. Bojorquez readily answered a number of hypotheticals of whether certain behavior probably constituted a violation. (RR(2) 94-95, 111-112, 120-121, 143-145, 204-205)

Mr. Bojorquez also testified that he believes TOMA to be a content-based restriction of speech because it governs verbal communications regarding matters of public business, he thinks that's content-based. When asked if he agreed that the holding in *Asgeirsson* regarding content applied to both §§ 551.143 and 551.144, he answered: "Continually." (RR(2) 90) When pressed for the functional difference between the two sections, Mr. Bojorquez responded: "A

geographic gathering of people in the same place and time or via the Internet." Further, Mr. Bojorquez did not think section 551.143 is triggered unless there's a conspiracy and intent. (RR(2) 142-143) Mr. Bojorquez does not believe that government officials have a constitutional right to discuss public policy among a quorum of their governing body in private. (RR(2) 134)

When asked if he had contributed to the amicus brief by the Texas Municipal League in the *Asgeirsson* case arguing the unconstitutionality of TOMA, he answered that his law firm had filed its own amicus brief. The arguments raised in that amicus brief are same arguments made to the trial court. Mr. Bojorquez conceded those arguments had been rejected by the Fifth Circuit in *Asgeirsson*. (RR(2) 98-99) When Mr. Bojorquez was asked if he has seen he had seen the video of the CLE presentation where current TML attorney Scott Houston tells the audience that he still thinks that the Texas Open Meetings Act is unconstitutional and he just doesn't care what the Fifth Circuit says, he responded that he had not, but that he had a lot of respect for Houston, he had hired to replace him at TML when left. When asked Mr. Houston was just giving the seminar advice or was rather trying to scare them, Mr. Bojorquez responded that: "[H]orror stories and scare tactics can also be a very effective way to teach an audience to be conservative and watch out and avoid problems. I think it's a legitimate tool, and it's one that I have employed myself from time to time." (RR(2) 122-123)

Mr. Jessup testified that he had attended TOMA training courses where they were instructed, "don't talk to one another because you're going to end up in jail like those folks out in Alpine." (RR(2) 226, 18). He recounted an incident where at a barbeque party he attended with other council members, he noticed that part of the drainage ditch under his city's jurisdiction had sloughed off. While Mr. Jessup was discussing options to deal with the situation with a councilmember, they were suddenly joined by two other councilmembers. Mr. Jessup, fearing a potential violation of TOMA, advised them to go back to the party. (RR(2) 227, 23 – 230, 1) Mr. Jessup also testified that he and the councilmembers fear "talking among themselves" because of potential criminal prosecution. (RR(2) 231, 1-4). He further stated that he tries to limit his conversations to just one other councilmember to "avoid being in the quorum situation." (RR(2) 233, 4-11). Mr. Jessup agreed that the requirement to avoid deliberating as a quorum outside a posted meeting was burdensome, but that it also promoted transparency and he agreed with it. He also agreed that TOMA protected members from being shut out by the majority. (RR(2) 251, 22 – 252, 20)

Mr. Scott, the mayor of Brookshire, testified regarding an example of a situation where he had inadvertently met two council members who were also member of an Economic Development Corporation and "immediately took a beeline so that I wasn't seen in a party of three." (RR(2) 263, 6-14) He stated that

the "nuance" from section 551.143 is that it makes him believe that "people can go to jail very easily" and that "prevents him from doing a better job. (RR(2) 266, 11-16). He also testified that, to comply with section 551.143, he tries "never to meet in parties of three" and tries to "avoid conversations where there's more than two people." (RR(2) 270, 6-9) Mr. Scott testified at length as to why he thought section 551.143 was confusing, but when presented with the text of the statute with the definition of the TOMA definition of "deliberation" plugged into the statute in place of the word "deliberation," he no longer found the statute confusing. (RR(2) 275, 12 – 276, 16)

Ms. Riggs, a former assistant attorney general with a long practice in open government cases on both sides of the docket, testified that, while § 551.143 "doesn't focus on the content of the speech. It says this is how you do it, but we're not going to prevent you from speaking." However, "§ 551.143 applies to a single member" because the statute is written "a member or members" who conspire. (RR(3) 28, 6-10) Ms. Riggs opined that § 551.143 is "content-based because it prohibits all speech -- in that very limited circumstance, even with two members or between a member and a member and their constituents, that's all speech." (RR(3) 88, 23 – 89, 1) However, she also testified that she lost a case where her argument was that two county commissioners "doing a briefing" in chambers prior to the meeting was a violation of 551.143. (RR(3) 31, 23 -- 33, 5) Yet again, when

asked to describe how section 551.143 was overbroad with regard to speech covered, she gave the example that 551.143 criminalized a constituent having lunch with two school board members and complaining about the coach. (RR(3) 52, 18 – 53, 18) Ms. Riggs at one point testified that she believed a conspiracy was merely "two or more people trying to reach an agreement." (RR(3) 91, 24 – 92, 2) She did confirm that the legislative intent behind the statute was, in fact, to prohibit the meeting in numbers of less than a quorum to eventually get at a quorum. (RR(3) 172, 5-10) She further agreed that reading the statute this way is the "only way to read it to make it be reasonable." (RR(3) 173, 19-21)

Ms. Riggs is not "aware of any prosecutions" under section 551.143. (RR(3) 60, 13). However, in her discussion of prosecutorial discretion, she stated that certain prosecutors will "tell you what the law is" in their particular county. (RR(3) 60, 24 – 61, 4) It is her opinion that 551.143 can be violated "inadvertently." (RR(3) 67, 15; 88, 5) However, she also testified that she believes the reason there are no cases speaking to or challenging this statute is probably because of the difficulty in enforcing it. (RR(3) 101, 13-21)

Ms. Riggs conceded she has handled high profile cases with strongly anti-open government positions (RR(3) 132, 6-8; 138, 8-15; 142, 13 – 143, 3), including providing an expert opinion for a governmental body in an open meetings litigation that she also represented. (RR(3) 133, 14-16; 140-141)

Mr. Kuykendall, the mayor of Oak Ridge North, testified that section 551.143 results in him not being able to access information to do his job, and that he has to rely upon others in the administration to provide that to him. (RR(3) 115, 16 – 116, 8) His primary concern with speaking with his constituents is not with section 551.143, but with concern that his words will be taken the wrong way. (RR(3) 126, 18 – 128, 1)

Mr. Zech, a lawyer representing governmental bodies, testified generally that he thought § 551.143 was confusing, but the only example he gave regarding a potential violation was an instance where the governmental body is properly in session and one member passes a note to another member regarding the prospects of passage of a particular proposal, which he characterized as not verbal because it was not a spoken exchange of words. (RR(4) 27, 16 -- 28, 4). Mr. Zech, however, believes the members of governmental bodies need rules because sometimes it is the nature of humans to do that which they should not. (RR(4) 38, 21 – 39, 11) He testified that he thought section 551.143 was vague, but whether "it rises to a constitutional level is for people smarter" than he is. (RR(4) 44, 9 –24) He testified that he did not recall the definition of "knowingly." (RR(4) 47, 4-9) He hasn't looked up the definition of "conspiracy" because he does not advise his clients on criminal responsibility. (RR(4) 51, 20 – 52, 3) He ultimately agreed that a conversation that occurs between two members of a public body is not an

attempt to form a quorum. (RR(4) 62, 9-13) Mr. Zech testified that he "has no idea" regarding the law of the parties regarding when a person solicits, encourages, directs, aids, or attempts to aid the other person in the commission of the offense. (RR(4) 64, 10 – 65, 9) He agreed there is no definition in TOMA for the word "meet" (as opposed to "meeting"). (RR(4) 77, 3-6) He agreed that "circumvent" does not mean "violate." (RR(4) 77, 10-25)

Mr. Rodriguez, a former Houston City Councilmember testified that he understood § 551.143 to prohibit meeting in numbers less than a quorum but with the intention of forming a quorum because this would be trying to circumvent a process or circumvent TOMA. (RR(5) 14, 8-19) Mr. Rodriguez never found TOMA (a) to hinder his work as a city councilmember; (b) limit his ability to converse with fellow city council members; (c) restrict or inhibit his ability to talk to constituents, or (d) hinder his ability to discuss possible business. (RR(5) 14, 20 – 15, 10) He testified that meeting with fellow councilmembers was not a violation as long as they were not trying to form a quorum or get a commitment. (RR(5) 30, 22 – 31, 6)

Mr. White testified that TOMA is a disclosure statute because the entire purpose of the statute is to provide transparency in government when the government is conducting public business. He testified that it is content-neutral because it does not (a) discriminate against any particular point of view; (b)

advocate a particular point of view on a particular subject, and (c) prohibit discussion of a particular subject. (RR(5) 67, 1-20) He testified that § 551.143 is meant to prohibit a knowing conspiracy to meet in groups of less than a quorum in order to have secret deliberations and to eventually reach a quorum. (RR(5) 68, 1-7) Mr. White stated that there is no constitutional right to discuss public business in private. (RR(5) 70, 23 – 71, 2) He testified that the compelling interests supporting TOMA, including 551.143, are (a) transparency in government; (b) the prevention of corruption; and (c) the prevention of exclusion of members outside the majority of a governmental body. (RR(5) 73, 9 – 74, 2) He further testified that a third party, for example a reporter, to be liable under TOMA, the third party would have to be intentionally aiding or abetting the crime of the members knowingly conspiring to circumvent the chapter by meeting in numbers less than a quorum for the purpose of secret deliberations. (RR(5) 77, 19 – 79, 4) Mr. White testified that there must necessarily be more than one person for there to be a conspiracy. (RR(5) 110, 20 – 111, 7). He further stated that, while TOMA does not reference the word "conspiracy," an ordinary person of reasonable intelligence knows not to participate in a criminal act. And with regard to the term "circumvent" as used in the statute, Mr. White testified that meant "trying to avoid compliance with the requirements of the Act" and that trying to read it as "avoid violating" makes no sense. (RR(5) 121, 11 – 122, 4)

Adrian Garcia, former Houston City Councilmember and former Harris County Sheriff, testified in his written comments that he understands section 551.143 to mean that it is against Texas law for a member of City Council to purposely meet in numbers less than a quorum in order to conduct a secret meeting of a quorum. He believes this would cover situations like secretly meeting with other members in small but secretly linked groups or by linking such secret groups through individuals or members serving as intermediaries. He never participated in such activity and, to his knowledge, no other city council members did so either. He testified that he has been asked about how he would vote on a specific issue by either an individual or another member. When that type of question occurred, he took the inquiry to be more in the form of a person trying to measure support for an issue, and not a purposeful attempt to form a quorum outside of a properly noticed meeting. He did not find that the Texas Open Meetings Act hindered his job as a council member or 'chilled' his ability to communicate with his fellow members or his constituents. (RR(6) State's Ex. 9)

V.
SUMMARY OF THE ARGUMENT

The Texas Open Meetings Act ("TOMA") applies only to a *quorum* of the members of governmental bodies on "public business or public policy over which the governmental body has supervision or control," and does nothing to restrict

communications between these elected officials and between any of them and the public outside the procedural restraints imposed by the TOMA statutory structure.

In addition to the salutary and compelling goals of transparency, faith in government, creating an environment where corruption cannot thrive, TOMA also protects the rights as public officials to observe and participate in the public policy making for which they were elected. Without TOMA, all a majority of members would have the power to expel the minority from the public policy process altogether.

The constitutionality of TOMA has already been squarely addressed by the Fifth Circuit. Appellees were indicted under a different statute than that directly challenged in *Asgeirsson v. Abbott*, 696 F.3d 454 (5th Cir. 2012). However, the First Amendment arguments and overbreadth arguments are the same for both, as conceded by Defendant's expert Alan Bojorquez. Further, despite Appellees' efforts to effectively rewrite the statute at issue, the arguments of the statute being unconstitutionally vague and ambiguous were also addressed by *Asgeirsson* and were rejected by the Fifth Circuit

In support of their assertion that § 551.143 is vague and ambiguous, Appellees have simply produced witnesses who testified that they were confused by the requirements of the statute with no real argument as to how prosecution could be or has been arbitrary. However, these are not unbiased witnesses and

most of their complaints were with regard to having to comply with TOMA at all and having to wait three days until there is time to notice a meeting. Appellees' experts -- lawyers -- gave inconsistent reasons for the statute's unconstitutionality, and testified inconsistently on the same issues. Further, these issues are for the Court, the ultimate expert on the law.

Indeed, it is this type of testimony that gives courts concern regarding the speculative, premature, and anti-democratic nature of judicial review of a facial challenge under which Appellees must show "that no set of circumstances exists under which [the statute] would be valid", *United States v. Salerno*, 481 U.S. 739, 745 (1987), or that the statute lacks any "plainly legitimate sweep", *Washington v. Glucksberg*, 521 U.S. 702, 740, n. 7 (1997) (Stevens, J., concurring in judgments) (internal quotation marks omitted). Nevertheless, rather than go through trial and come to this Court on a developed record, Appellees have created a record full of the very hypotheticals and speculation condemned by the Supreme Court. They argue that the statute can be arbitrarily enforced, but there have been to date no prosecutions under it because, according to expert Jennifer Riggs, it is difficult for a prosecutor to enforce section 551.143.

There is simply no question that TOMA, including 551.143, is a content-neutral time, place and manner regulation. In addition, TOMA is directed at the results of a quorum of a governmental body deliberating in private, i.e., corruption,

the appearance of corruption, faith of the governed in their institution, protection of members of governmental bodies who are not in the majority. Further, the Appellees get the First Amendment argument backwards, just as did the plaintiffs in *Asgeirsson*. The First Amendment supports, indeed requires the type of disclosure required by TOMA and section 551.143.

VI.
ARGUMENT

I: The trial court incorrectly dismissed the indictments as facially unconstitutionally vague and ambiguously.

A. TOMA and Section 551.143

The Texas Open Meetings Act ("TOMA") applies only to a *quorum* of the members of governmental bodies on "public business or public policy over which the governmental body has supervision or control," and does nothing to restrict communications between these elected officials and between any of them and the public outside the procedural restraints imposed by the TOMA statutory structure. TEX. GOV'T CODE § 551.001(4). TOMA is a regulation of governmental bodies with rulemaking authority and sets forth how they must conduct the business with which they are charged – that is, openly. To insure the effectiveness of this required disclosure of deliberations of governmental bodies, TOMA includes criminal sanctions for public officials who knowingly participate in violations of TOMA.

Appellees contend that these disclosure requirements criminalize almost all communications by members of governmental bodies, among themselves and with their constituents. However, TOMA requires merely that these elected officials, as a body, deliberate matters for which they have the public trust by virtue of their election, in the presence of the public to whom they are accountable. Their actions violate TOMA only to the extent they knowingly act as a body without providing the public with notice of when and where they will be discussing the public's business and which topics they will address and, outside certain exceptions allowing a closed session, deliberating the public's business outside the presence of the public.

Indeed, TOMA also protects the rights as public officials to observe and participate in the public policy making for which they were elected. Without TOMA, a majority of members would have the power to expel the minority from the public policy process altogether. To do so, all a majority would have to do would be to convene a private meeting and make decisions without the minority members' knowledge or involvement and turn any public meeting into an empty exercise.

Appellees' witnesses' primary complaint is that TOMA unduly burdens their ability to get things done. However, TOMA is no more burdensome that what attorneys and judges do every day. Attorneys and Judges are forbidden from

discussing pending cases with one another outside the presence of all the parties involved under established rules involving *ex parte* communications. The same kind of restriction on secret speech, not free speech, is at issue here. If attorneys can follow such rules without difficulty in the course of representing individuals, surely so can state and local office holders on behalf of ordinary citizens.

Section 551.143, one of the two TOMA provision with criminal penalties for violation of TOMA's openness requirements. It provides as follows:

> (a) A member or group of members of a governmental body commits an offense if the member or group of members knowingly conspires to circumvent this chapter by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter.

APPX2

Section 551.143 forms a crucial keystone of the Act by prohibiting governmental body members from meeting as a quorum in secret, but disguising this by not physically being present at the same time.

B. Prior TOMA Legal Challenges

The constitutionality of Tex. Gov't Code § 551.144 specifically and TOMA as a whole was challenged in two cases on grounds they (a) violated the First Amendment rights of members of governmental bodies; and, (b) were overbroad and were unconstitutionally vague and ambiguous. The first of these cases, *Rangra v. Brown*, 566 F.3d 515 (5th Cir. 2009, opinion withdrawn *per curiam*), was

dismissed for lack of jurisdiction pending *en banc* rehearing.[1] A new group of plaintiffs essentially filed the same lawsuit ultimately resulting in the Fifth Circuit upholding the constitutionality of § 551.144, and TOMA. *Asgeirsson v. Abbott*, 696 F.3d 454 (5th Cir. 2012). Section 551.144 is the other TOMA provision that provides criminal sanctions for certain conduct that violates openness requirements. It provides that:

> (a) A member of a governmental body commits an offense if a closed meeting is not permitted under this chapter and the member knowingly:
> (1) calls or aids in calling or organizing the closed meeting, whether it is a special or called closed meeting;
> (2) closes or aids in closing the meeting to the public, if it is a regular meeting; or
> (3) participates in the closed meeting, whether it is a regular, special, or called meeting.

Asgeirsson dealt with every issue raised by Appellees in their motion to dismiss, by their witnesses, and in their arguments to the trial court. In rejecting the *Asgeirsson* plaintiffs' claims that TOMA was fatally vague and ambiguous, the Fifth Circuit noted that the concern underlying the vagueness doctrine is that citizens will not be able to predict which actions fall within the statute, leading to arbitrary and discriminatory enforcement. Where there are few guidelines for the application of a statute, a "standardless sweep" could allow "policemen, prosecutors, and juries to pursue their personal predilections." *Id*. at 466.

[1] The *Rangra* dispute itself arose out of a secret discussion of public business by four of the five city council members at the express exclusion of the fifth member.

While Appellees claim section 551.143 is vague on its face, their witnesses and experts complaints arise from TOMA's complexity rather than from its vagueness or lack of standards. As *Asgeirsson* held, a great deal of training may be required to predict the interpretation of the tax code, for example, but that is not because it is standardless or arbitrary. In fact, the vast body of law that causes TOMA to be so complex arguably makes it less vague by providing the necessary standards. *Id*. at 466-67.

C. The Limited Value of the Testimony Adduced at the Evidentiary Hearing

The four days of testimony taken by the trial court is of limited value. It largely consisted of hypotheticals and legal argument by witnesses, including lawyers who practice in the field who are or have acted as lawyers for governmental bodies. Mr. Bojorquez appears to make his living advising governmental bodies that he thinks TOMA criminalizes virtually all communications between a member and his constituency, and that the slightest mistake will subject a member to criminal sanction. He specifically testified that he thought instilling fear was an effective education method. (RR(2) 122-123)

Despite the claim that the statute could be arbitrarily applied, not one witness could ever recall a criminal case being brought under this provision before this one. While insisting that prosecutors can run amok with this statute,

Appellees' expert, Jennifer Riggs also gave the opinion that there have been no prosecutions because of the "difficulty in enforcing it." (RR(3) 101, 13-21)

Appellees, their lawyers and one of their expert witnesses argue that the constitutionality of § 551.143 should be judged differently that the holding in *Asgeirsson*, because *Asgeirsson* involved only § 551.144 and, alternately, that the holding in *Asgeirsson* has been overruled by the opinions of *Reed v. Gilbert*, 135 S.Ct. 2218 (2015) and *Ex Parte Lo*, 424 S.W.3d 10 (Tex. Crim. App. 2013). However, their expert, Jennifer Riggs, believes that 551.143 is unconstitutional because it prohibits an entire category of speech, not because it targets deliberations regarding business over with the governmental body has jurisdiction.

Not one of Appellees' experts had any knowledge regarding the "law of the parties" or its application in this context and were inconsistent or unclear regarding the definition of conspiracy.

As set out below, these experts' testimony misses the mark. But these are ultimately legal issues where this Court is the expert, and the testimony of experts on the Texas Open Meetings Act is simply further argument and not part of the factual background of the case.

No witness, including current and former members of governmental bodies, testified that any member of a governmental body had ever been prevented from speaking on any issue or topic, only that they thought TOMA made their job

harder. Indeed, most of the complaints expressed did not even concern § 551.143. Mr. Jessup gave the example of a quorum of members showing up at the same place at the same time to look at a problem and having to wait to discuss the issue. (RR(2) 227, 23 – 230,1) Mr. Scott testified similarly. (RR(2) 263, 6-14) Indeed, Mr. Scott, after repeatedly testifying under leading questions that § 551.143 was confusing, no longer found it so after a simple substitution of the definition of "deliberation" was plugged into the statute in place of the word "deliberation." (RR(2) 275, 12 – 276, 16) Mr. Kuykendall's primary concern in speaking with his constituents was not § 551.143, but that his words will be taken the wrong way. (RR(4) 27, 16 – 28, 4)

The Facial Challenge

Appellees have brought a facial challenge to the constitutionality of Tex. Gov't Code § 551.143. In *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450-51 (2008), the U.S. Supreme Court stated several reasons for disfavoring facial challenges:

> "Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of "premature interpretation of statutes on the basis of factually barebones records". *Sabri v. United States*, 541 U.S. 600, 609 (2004) (internal quotation marks and brackets omitted). Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither "'anticipate a question of constitutional law in advance of the necessity of deciding it'" nor "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288,

> 347 (1936) (Brandeis, J., concurring). Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2006)."

Due to the speculative, possibly premature, and anti-democratic nature of judicial review of a facial challenge, the Supreme Court has placed a higher burden on those wishing to establish a facial challenge. "To succeed in a typical facial attack, [the respondent] would have to establish "that no set of circumstances exists under which [the statute] would be valid", *United States v. Salerno*, 481 U.S. 739, 745 (1987), or that the statute lacks any "plainly legitimate sweep", *Washington v. Glucksberg*, 521 U.S. 702, 740, n. 7 (1997) (Stevens, J., concurring in judgments) (internal quotation marks omitted). Nevertheless, rather than go through trial and come to this Court on a developed record, Appellees have created a record full of the very hypotheticals and speculation condemned by the Supreme Court.

Section 551.143's Plainly Legitimate Sweep

Appellees argue that the statute is unconstitutionally vague and meaningless. One of their experts, Mr. Bojorquez, referred to this section as "gibberish." (RR2 40, 24) However, the meaning of the statute adduced from its "plain language" by Appellees and their experts is strained. Appellees ignore words in the statute, refuse to give other words their ordinary and contextual meaning, and, by focusing

on what they argue is the literal meaning of certain words, concoct a nonsensical construction that would render the statute defective.

Despite the earnestly delivered analysis of Appellees experts, the interpretation of the statute is for the Court. Under every reasonable construction of the statute, it is directed at the very same evil as that of its companion, section 551.144, the constitutionality of which was upheld in *Asgeirsson*.

The interpretations of Appellees' experts would have the Court conclude that "knowingly conspires to circumvent" . . . "for the purpose of secret deliberations in violation of this chapter" means to actually attempt to *comply* with the chapter by "avoiding" meeting in a quorum. This is purportedly because the word "deliberation" is defined in TOMA as "a meeting between a quorum of a governmental body, or between a quorum of a governmental body and another person." This, Appellees posit, requires the physical assembly of a quorum.

Similarly, Appellees argue that the phrase "by meeting in numbers less than a quorum" supposedly makes no sense because TOMA defines "meeting" as "a deliberation between a quorum of a governmental body, or between a quorum of a governmental body and another person, during which public business or public policy over which the governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action".

The Texas Attorney General and every court to look at this statute have rejected the argument that this statute is internally contradictory. Notably, the Attorney General addressed this specific issue and held that:

> The OMA does not require that governmental body members be in each other's physical presence to constitute a quorum. *See* Tex. Gov't Code Ann. § 551.001(6) (Vernon Supp. 2004-05) (defining "quorum" simply as a majority of a governmental body). As such, we construe section 551.143 to apply to members of a governmental body who gather in numbers that do not physically constitute a quorum at any one time but who, through successive gatherings, secretly discuss a public matter with a quorum of that body. In essence, it means "a daisy chain of members the sum of whom constitute a quorum" that meets for secret deliberations. Under this construction, "deliberations" as used in section 551.143 is consistent with its definition in section 551.001 because "meeting in numbers less than a quorum" describes a method of forming a quorum, and a quorum formed this way may hold deliberations like any other quorum, *see id*. § 551.001(2).

Tex. Att'y Gen. Op. No. GA-0326 p. 2 (2005). In an apparent slip, Appellees' expert Jennifer Riggs conceded that reading the statute as the attorney general did is "the only way to read it to make it be reasonable. (RR(3) 173, 19-21)

The federal district court in *Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433, 473, 476 (W.D. Tex. 2001) found that "meeting in numbers less than a quorum for the purpose of secret deliberations" refers to a quorum or more of a body that attempts to avoid the TOMA's purposes by deliberately meeting in numbers physically less than a quorum in closed sessions to discuss public business and then ratifying its actions in a physical gathering of the quorum in a subsequent sham public meeting. *Accord Willmann v. City of San*

Antonio, 123 S.W.3d 469, 478 (Tex. App.-San Antonio 2003, pet. denied); Tex. Att'y Gen. Op. No. JC-0307 (2000) at 8; Tex. Att'y Gen. Op. No. LO-95-055, at 4; Tex. Att'y Gen. Op. No. DM-95 (1992) at 4; see generally *Hitt v. Mabry*, 687 S.W.2d 791, 794 (Tex. App.-San Antonio 1985, no writ). In *Esperanza*, San Antonio city council members passed around a consensus memorandum on the city's budget, which a number of council members equaling at least a quorum signed individually, and then adopted the budget reflected in the memorandum at an open meeting without discussing the memorandum's contents. Even Appellees' expert Jennifer Riggs conceded that these actions by the council members of San Antonio constituted a violation of TOMA. (RR3 71, 13 – 71, 3) This is not the stuff of a facial challenge. The language of the statute is not less "plain" by virtue of the fact that it is a criminal statute.

Appellees further argue that Davenport is not on notice that he could be liable, or actually liable, under § 551.143 because he is not a member of a governmental body. However, a person who is not a member of the commissioners court may be charged with a violation of §§ 551.143 or 551.144 of TOMA, but only if the person acting with intent aids or assists the member or members who knowingly act to violate the Act. See Tex. Att'y Gen. Op. No. JC-0307 (2000) (RR6 S. Ex. 4) There is no difference for the criminal liability for

acting as a party with requisite intent to aid or assist violation of any other Texas criminal statute.

Appellees are also at pains to stress to the Court that their facial challenge is only to § 551.143, and not to § 551.144, which was specifically challenged in *Asgeirsson*, but they have also launched a full assault on *Asgeirsson's* holdings. As opposed to *Asgeirsson*, which challenged the entirety of TOMA as vague and ambiguous, Appellees specifically challenge § 551.143. However, as in *Asgeirsson*, the true complaints regarding the statute arise from TOMA's complexity rather than its vagueness or lack of standards. As the *Asgeirsson* court so aptly noted, "a great deal of training may be required to predict the interpretation of the tax code, for example, but that is not because it is standardless or arbitrary. In fact, the vast body of law that causes TOMA to be so complex arguably makes it less vague by providing the necessary standards." *Asgeirsson*, 696 F.3d at 466. And, as in *Asgeirsson*, Appellees do not argue that any of the cases interpreting TOMA conflict or add ambiguity. Rather, the interpretations of § 551.143 have uniformly held it does not require the physical presence of a quorum but rather addressed situations where members of a governmental body act as a quorum though never physically together as such.

"Some ambiguity is unavoidable, and perfect clarity and precise guidance have never been required even of regulations restricting expressive activity."

Holder v. Humanitarian Law Project, 56l U.S. 1 (2010) (citation and internal quotation marks omitted). Neither TOMA as a whole nor its component § 551.143 is unconstitutionally vague.

II: The trial court erred by dismissing the indictment on grounds that Texas Government Code § 551.143 on its face violates the First Amendment of the Constitution of the United States.

A. Section 551.143 is subject to intermediate scrutiny because it is a statute concerning private speech that is not aimed at suppressing specific content, but at eliminating the harm of government that is not transparent and is a content neutral time place and manner restriction.

Appellees strenuously argue that TOMA must satisfy strict scrutiny because it "regulates speech." However, *Asgeirsson* concludes on three different grounds that TOMA is subject to intermediate scrutiny.

To the extent it can even be said that TOMA restricts the speech of the members of Texas' governmental bodies at all, it is undoubtedly a reasonable time, place and manner restriction. TOMA is completely consistent with the Supreme Court's definition of "content-neutral" speech regulations as those that "are justified without reference to the content of the regulated speech." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc*., 425 U.S. 748, 771 (1976); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981). TOMA does not contravene the fundamental principle that underlies

concern about "content-based" speech regulations: that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). Indeed, TOMA, similar to the ordinance at issue in *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986), is not directed to the content of speech even in the broad sense, but to the adverse secondary effects of closed government: corruption, disenfranchisement of the public, and lack of accountability. *See id.* at 48-49.

In their Motion to Dismiss, Appellees claim *Asgeirsson*'s holding is "dubious" after the Supreme Court's holding in *McMullen v. Coakley*, 134 S.Ct. 2518 (2014), for which *certiorari* had been granted the same year it had been denied in *Asgeirsson*. Appellees' analysis regarding the applicability of *McMullen* to TOMA is thin, and none of Appellees' experts relied upon *McMullen* during their testimony. Rather, they have now shifted focus to the case of *Reed v. Gilbert*, 135 S.Ct. 2218 (215), a case involving the regulation of temporary signs.

Despite Appellees' assertions, *Reed*, did not explicitly overrule any Supreme Court precedent, and is firmly grounded in the court's prior rulings. *Reed* in no way supersedes or diminishes the opinion in *Asgeirsson*. To the extent *Reed* can be said more restrictive in its handling of content-based analysis than the well-established precedent it cites in support of its holding is best analyzed by the

looking at the distinction between public and private speech than the well-established precedent it cites in support of its holding. Principally, as distinguished from *Asgeirsson*, *Reed* is focused on speech at a "traditional public forum."

Asgeirsson, on the other hand, held that concerns raised regarding suppression of public speech *are not implicated* by TOMA. For example, *Asgeirsson* court rejected the plaintiffs' argument that TOMA was unconstitutional under the holding in *Citizens United v. Federal Election Commission*, 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010), in which the Supreme Court struck down a statute restricting the political donations of corporations and labor unions. *Asgeirsson* held TOMA

> does not apply to government officials because of any hostility to their views. Rather, only *private speech* by government officials lessens government transparency, facilitates corruption, and reduces confidence in government. Therefore, the identity-based application of the statute is not evidence of a content-based purpose.

Asgeirsson, 696 F.3d at 462 (emphasis added). Rather, the concern in *Citizens United* was :

> about public attitudes toward particular ideas and speakers. It is aimed at regulations that keep speech from reaching the marketplace of ideas, and it is therefore inapplicable to statutes that restrict only *private speech*. Thus, TOMA's application to only members of public bodies does not raise either of the concerns expressed in *Citizens United*.
>
> Accordingly, TOMA is a content-neutral time, place, or manner restriction, and as such, it should be subjected to intermediate scrutiny.

Id. (emphasis added).

None of the cases to which Appellees cite carry the water for their arguments. *Ex parte Lo*, 424 S.W.3d 10 (Tex. Crim. App. 2013) does not set a separate Texas standard, nor a separate standard for a criminal statute. In concluding that a statute prohibiting an individual from communicating in a sexually explicit manner with a person believed to be a minor with an intent to arouse or gratify sexual desire was a presumptively invalid content-based regulation on speech, the Texas Court of Criminal Appeals relied on *Ashcroft v. ACLU*, 542 U.S. 656, 660, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004), an action brought under 28 U.S.C. § 1983, just like *Asgeirsson*.

The cases cited by Appellees in support of their arguments along with *Asgeirsson*, were all analyzed and cited in the case of *Defense Distributed v. U.S. Dept. of State*, 121 F.Supp.3d 680 (W.D. Tex. 2015), *affirmed*, 838 F.3d 451 (2016), involving prepublication approval requirement for technical data to 3D print firearms published on internet violated the rights to free speech under the First Amendment. In concluding that a regulation that targets "technical data" related to "defense articles" was content-neutral, and rather than finding a distinction between the cases, the *Defense Distributed* court relied upon *Reed*, *McCullen* and *Asgeirsson* each in concluding as follows:

> "A regulation is not content-based, however, merely because the applicability of the regulation depends on the content of the speech."

> *Asgeirsson v. Abbott*, 696 F.3d 454, 459 (5th Cir.2012). Rather, determination of whether regulation of speech is content-based "requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Reed*, 135 S.Ct. at 2227. *See also Ward*, 491 U.S. at 791, 109 S.Ct. 2746 (principal inquiry in determining content-neutrality, "is whether the government has adopted a regulation of speech because of disagreement with the message it conveys").
>
> Employing this inquiry, the Supreme Court has found regulations to be content-neutral where the regulations are aimed not at suppressing a message, but at other "secondary effects." For example, the Supreme Court upheld a zoning ordinance that applied only to theaters showing sexually-explicit material, reasoning the regulation was content-neutral because it was not aimed at suppressing the erotic message of the speech but instead at the crime and lowered property values that tended to accompany such theaters. *Renton v. Playtime Theatres, Inc*., 475 U.S. 41, 47–48, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). The Supreme Court similarly upheld a statute establishing buffer zones only at clinics that performed abortions, concluding the statute did not draw content-based distinctions as enforcement authorities had no need to examine the content of any message conveyed and the stated purpose of the statute was public safety. *McCullen v. Coakley*, —– U.S. ——–, 134 S.Ct. 2518, 2531, 189 L.Ed.2d 502 (2014) (noting violation of statute depended not "on what they say," but "simply on where they say it"). The Fifth Circuit has likewise found regulations content-neutral, even where the regulation governed a specific topic of speech. *See Kagan v. City of New Orleans*, 753 F.3d 560, 562 (5th Cir.2014), cert. denied, —– U.S. —– –, 135 S.Ct. 1403, 191 L.Ed.2d 361 (2015) (upholding regulation requiring license for a person to charge for tours to City's points of interest and historic sites, "for the purpose of explaining, describing or generally relating the facts of importance thereto," finding regulation "has no effect whatsoever on the content of what tour guides say").

The power of the citizens of Texas to require transparency of their elected officials should not be reviewed under the analysis set out in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), as it was in *Rangra v. Brown*, 566 F.3d 515 (5th Cir. 2009,

opinion withdrawn per curiam), and the panel on that opinion was surely correct not to extend the logic of *Garcetti* to public officials acting in their elected capacity. *Rangra* is not in any way authority that should be relied upon or cited to in this appeal. That appeal was dismissed as moot and therefore not precedent. The citizens who have elected the Appellees and members of other governmental bodies are entitled to set conditions by which they will serve their mandates. As the ultimate decision-makers in our representative form of limited government, the public may demand that its business be done in a way that gives the voters sufficient knowledge regarding how these elected officials have discharged their duties. That is, these elected officials, *in their elected capacities*, are not acting or speaking solely in their own rights, but as representatives of the voters. This is the key idea behind the ideal of limited government.

If a majority of their constituents disagrees with the positions taken by any or all of these elected officials, or feels they are not acting with sufficient force for the public good, the constituents' options are not limited to writing an op-ed piece, to picketing or public demonstration or the other typical means by which the First Amendment promotes resolution of issues in the marketplace of ideas, but include the power to remove these officials through the normal process of elections or, in case of acute breach of the public trust, by seeking removal of the elected official(s) prior to an election.

Indeed, the Appellees' arguments, if accepted, would lead to the insulation of these elected officials from the constituency they represent. It would subvert the power of the voters to compel their own representatives to handle the business for which they were elected in meetings where these voters may attend and observe. In fact, the public seeks only to know what these officials say and do when acting as a governmental body. The implications of subjecting TOMA to strict scrutiny are grave, to say the least, and would mark a significant milestone in placing government in the hands of special interests whose influence and activities are most effective when they never see sunlight.

B. Section 551.143 is subject to intermediate scrutiny because it is a disclosure statute.

Asgeirsson also found that *Citizen United's* separate holding regarding disclosure statutes provides an independent basis for finding TOMA is subject to intermediate scrutiny and constitutional. *Asgeirsson*'s discussion in this connection bears repeating in full:

> For First Amendment purposes, the requirement to make information public is treated more leniently than are other speech regulations. The Court has often upheld disclosure provisions even where it has struck down other regulations of speech in the same statutes. *See, e.g., Citizens United*, 130 S.Ct. at 914; *Buckley v. Valeo*, 424 U.S. 1, 68, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). And the Court has generally upheld disclosure requirements that are unlikely to subject the speaker to harassment or persecution. *See e.g., United States v. Harriss*, 347 U.S. 612, 625, 74 S.Ct. 808, 98 L.Ed. 989 (1954); *Doe # 1 v. Reed*, 561 U.S. 186, 130 S.Ct. 2811, 2818–21, 177 L.Ed.2d 493 (2010). The

> justification is that disclosure requirements are less effective in suppressing the underlying ideas of the speech that is burdened.10
>
> In *Citizens United*, the Court upheld the portions of the Bipartisan Campaign Reform Act ("BCRA") that required political advertisements to contain disclaimers indicating who paid for them. Id. Because the Court classified the statute as a disclosure requirement, it subjected it to exacting rather than strict scrutiny. Id. The Court reasoned that disclosure requirements do not prevent individuals from speaking even if they burden the ability to speak. *Id*. As with the BCRA, TOMA burdens the ability to speak by requiring disclosure. TOMA's disclosure requirement burdens private political speech among a quorum of a governing body, but it does so in the same way that the BCRA's disclosure requirement burdened anonymous political speech in political advertisements. Neither statute aims to suppress the underlying ideas or messages, and they arguably magnify the ideas and messages by requiring their disclosure.
>
> Plaintiffs contend that because TOMA punishes *private speech*, it does not merely require disclosure. That is a distinction without a difference: To enforce a disclosure requirement of certain speech, the government must have the ability to punish its nondisclosure. If there were no punishment for nondisclosure, the speaker would have no incentive to disclose until the enforcer of the statute prosecuted him or obtained an injunction. That would render any disclosure requirement so arduous to enforce that it would be ineffective.

Id. at 462-63 (emphasis added).

By arguing that a statutory framework requiring a governmental body to openly deliberate regarding "public business or public policy over which the governmental body has supervision or control" is directed at the "content" of the speech of the members of these bodies, and TOMA therefore to strict scrutiny, the Appellees have sidestepped proper application of First Amendment jurisprudence. In fact, the First Amendment *requires* informed access to the workings of

government. These First Amendment principles undergird TOMA's disclosure requirements.

There is nothing in the language of the First Amendment itself from which a right of public access to legislative and rule-making proceedings may automatically be inferred. Nonetheless, the existence of the right in question can be readily recognized once the rationale of Supreme Court decisions is clearly understood. Much of the applicable case law has concerned the public's, or the media's, access to judicial, and in particular criminal, proceedings. The landmark Supreme Court case of *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) established that a criminal trial must, except under certain limited conditions, be open to the public. The *Richmond Newspapers* Court was called upon to decide if a trial court had acted properly when, without considering less restrictive alternatives, it granted defense counsel's motion to close the trial to the public. The Court held that the judge's action violated the First and Fourteenth Amendments. It explained:

> The First Amendment, in conjunction with the Fourteenth, prohibits government from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.

Id. at 575.

Passages such as this abound in *Richmond Newspapers* and make clear that it is a case about access not only to criminal trials, but equally to "matters relating to the functioning of government." Access to criminal trials is but a special case of a right to be informed about government which the court held to be included in the First Amendment.

The importance of *Richmond Newspapers* lies both in its recognition of a public right of access to governmental proceedings and in its restriction of the conditions under which that right may be circumscribed. *Richmond Newspapers* recognized only a "qualified right," but one which cannot be qualified except for good cause. In the case of criminal trials, for example, the Court held that the public must be granted access "[a]bsent an overriding interest articulated in findings." *Id*. at 581.

That *Richmond Newspapers* applies to legislative and rule-making proceedings as well is evidenced by the elaborations to be found in its concurring opinions. Justice Stevens viewed the majority as having denounced "arbitrary" interferences with First Amendment rights. He stated:

> Today ... for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.

Id. at 583. Justice Brennan recognized that such restrictions as have in the past been placed by the Supreme Court on the public's freedom of access to information were justified by the nature of the information:

> Read with care and in context, our decisions must ... be understood as holding only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality.

Id. at 586. The privilege is also tempered by the context in which it is asserted: "An assertion of the prerogative to gather information must accordingly be assayed by considering the information sought and the opposing interests invaded." It is apparent as well from Brennan's concurrence that he understood the significance of the case to extend far beyond the matter of access to criminal trials. In characterizing what he termed the "structural" role played by the First Amendment "in securing and fostering our republican form of government," Brennan indicated that freedom of communication in general is of chief concern:

> Implicit in this structural role is not only "the principle that debate on public issues should be uninhibited, robust and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), but also the antecedent assumption that valuable public debate--as well as other civic behavior--must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.

Id. at 588.

Subsequent Supreme Court decisions reinforce the conclusion that a First Amendment right of access extends well beyond access to criminal trials. Although most of those decisions have dealt chiefly with press or public access to criminal trials in particular, a concern for access to information about government generally informed the decisions. This concern, indeed, is typically invoked as the major premise from which the right of access to criminal trials may be inferred. Thus in *Globe Newspaper Co. v. Superior Ct*, 457 U.S. 596 (1982), the Supreme Court justified its freedom-of-access conclusion by saying that "to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one." *Id*. at 604-605, 102 S.Ct. at 2619.

The Supreme Court's enunciation of the notion of a "qualified First Amendment right," and of the special circumstances in which alone the right may be defeated, is restated and reinforced in later decisions. *Globe Newspapers* made clear that

> the circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where ... the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.

Id. at 606-607. Then, in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), where the court specifically extended the public's right of access to include voir dire examinations of prospective jurors, it spoke of a "presumption of openness" that could be rebutted only by adducing strong, countervailing concerns. The court added:

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

With these decisions in mind, can it be doubted that public access to legislative and rule-making meetings would even more directly and forcefully serve the goals of ensuring an informed electorate and improving our system of self-government? Applying the "historical" and "functional" tests enunciated in *Globe Newspapers*, each is satisfied in the same degree by legislative as by judicial proceedings. The historical test is met because Texas' legislative and rule-making proceedings have traditionally been open to the public. Applying the functional test, the effect of holding open meetings would be salutary and the benefits would be several. Indeed, virtually all of the advantages of openness which courts have found in regard to judicial proceedings, both criminal and civil, are equally applicable to the legislative process. These include the following:

a) The integrity of the fact-finding process is enhanced by open proceedings.

b) Public respect for the legislative process is increased by open proceedings.

c) Open proceedings provide a "therapeutic outlet."

d) The ability of the public to engage in informed discussion of governmental affairs, to cast an informed ballot, and ultimately to improve our system of self-government are all enhanced by open proceedings.

The deliberations of and actions taken by these governmental bodies *is* governmental information to which the public has a qualified First Amendment right of access. Appellees' argument to the trial court makes no mention of this jurisprudence, and essentially turns it on its head, placing the burden on the citizens and voters of Texas to prove TOMA is the least restrictive means to serve a compelling state interest instead of finding that only a compelling interest would serve to *restrict* access to this information of fundamental importance to self-government. Appellees' attempt to evade the salutary rulings by the U.S. Supreme Court in *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876 (2010) and *Doe v. Reed*, 130 S. Ct. 2811 (2010) by blankly claiming that TOMA "is not a disclosure statute" when that is precisely what it is. Analysis of this case is on point with the analysis in *Citizens United* that knowing *who* is making the expenditures (speech) can provide "citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters." *Citizens United*, 130 S. Ct. at 916. The requirement that the deliberation of a governmental body take place at a scheduled meeting is nothing more than a

requirement that citizens be able to see what position their elected officials take when acting in their official capacity – the very essence of disclosure.

These authorities, and *Asgeirsson*, also make clear that section 551.143 is not overbroad. For a statute to be overbroad, it must reach a substantial amount of constitutionally protected conduct. "The overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). There is no evidence in the record that § 551.143 is reaching "a substantial amount of constitutionally protected speech," because Appellees' own experts offer no support for the proposition that government officials have a constitutional right to discuss public policy among a quorum of their governing body in private. Furthermore, the speech the statute does reach is within its "plainly legitimate sweep" in fostering government transparency, trust in government, and participation by all elected officials.

VII.
CONCLUSION AND PRAYER

A nation founded on the principle of government of the people, by the people and for the people necessarily requires that government be conducted in view of the people. This theory of government runs back to our founding fathers and is the bedrock on which this nation is built. The First Amendment supports this right of the people for open, limited government and the Texas Open Meetings

Act was passed to provide a legislative framework to ensure that governmental bodies in Texas meet their constitutional duty to do business in the light of day.

Appellees' arguments and their witnesses' testimony do not raise a successful facial challenge to Texas Government Code § 551.143, a keystone provision of the Texas Open Meetings Act.

Appellant prays the Court to enter an opinion reversing the trial court's order dismissing these cases and for all other relief to which it may show itself entitled and as the Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing was prepared in Microsoft Word in Times New Roman 14 point font; the word-count function shows that, excluding these sections exempted under TRP 9.4(i)(1). The brief contains 10,940 words.

/s/ Joseph R. Larsen
Joseph R. Larsen

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appellant's Brief has been forwarded to the counsel of record by electronic service, telecopy, or first class mail on this the 10th day of July, 2017.

/s/ Joseph R. Larsen
Joseph R. Larsen

APPENDIX

MONTGOMERY COUNTY, TEXAS
DISTRICT COURT ORDERS & STATUTE

Montgomery County, Texas District Court Orders

Tex. Gov't Code § 551.143

CAUSE NO. 16-06-07318-CR

STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
v.	§	MONTGOMERY COUNTY, TEXAS
	§	
MARC DAVENPORT	§	221st JUDICIAL DISTRICT

ORDER

On March 27, 2017 a hearing commenced regarding Defendant Marc Davenport's Motion to Dismiss the Indictment in the above-referenced cause. The hearing concluded on April 3, 2017. The Court, after considering the motion, the state's response, all other pleadings and documents submitted by the parties, the evidence presented and the argument of counsel, is of the opinion that the motion should be GRANTED.

It is, therefore, ORDERED that the indictment in this cause is hereby dismissed, and the Defendant is hereby discharged therefrom.

SIGNED the 4th day of April, 2017.

JUDGE PRESIDING
Hon. Randy M. Clapp, sitting by assignment.

Minute
Date: 4-10-17

CAUSE NO. 16-06-07315-CR

STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
v.	§	MONTGOMERY COUNTY, TEXAS
	§	
CRAIG DOYAL	§	221st JUDICIAL DISTRICT

ORDER

On March 27, 2017 a hearing commenced regarding Defendant Craig Doyal's Motion to Dismiss the Indictment in the above-referenced cause. The hearing concluded on April 3, 2017. The Court, after considering the motion, the state's response, all other pleadings and documents submitted by the parties, the evidence presented and the argument of counsel, is of the opinion that the motion should be GRANTED.

It is, therefore, ORDERED that the indictment in this cause is hereby dismissed, and the Defendant is hereby discharged therefrom.

SIGNED the 4th day of April, 2017.

JUDGE PRESIDING
Hon. Randy M. Clapp, sitting by assignment.

Minute
Date: 4-10-17

CAUSE NO. 16-06-07316-CR

STATE OF TEXAS	§	IN THE DISTRICT COURT OF
	§	
v.	§	MONTGOMERY COUNTY, TEXAS
	§	
CHARLIE RILEY	§	221st JUDICIAL DISTRICT

ORDER

On March 27, 2017 a hearing commenced regarding Defendant Charlie Riley's Motion to Dismiss the Indictment in the above-referenced cause. The hearing concluded on April 3, 2017. The Court, after considering the motion, the state's response, all other pleadings and documents submitted by the parties, the evidence presented and the argument of counsel, is of the opinion that the motion should be GRANTED.

It is, therefore, ORDERED that the indictment in this cause is hereby dismissed, and the Defendant is hereby discharged therefrom.

SIGNED the 4th day of April, 2017.

JUDGE PRESIDING
Hon. Randy M. Clapp, sitting by assignment.

Minute
Date: 4-10-17

Sec. 551.143. Conspiracy to Circumvent Chapter; Offense; Penalty.

- **(a)** A member or group of members of a governmental body commits an offense if the member or group of members knowingly conspires to circumvent this chapter by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of this chapter.

- **(b)** An offense under Subsection (a) is a misdemeanor punishable by:
  - **(1)** a fine of not less than $100 or more than $500;
  - **(2)** confinement in the county jail for not less than one month or more than six months; or
  - **(3)** both the fine and confinement.